

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
(Western Division)

CRAIG R. JALBERT,

Plaintiff,

Civil Action
No. 04-40088

V.

ALCATEL USA MARKETING, INC.,

Defendant.

PLAINTIFF'S MOTION TO DISMISS APPEAL

Plaintiff Craig Jalbert, the Liquidating CEO (the “LCEO”) of the substantively consolidated bankruptcy estate of ACT Manufacturing, Inc. and its affiliated debtors (the “Debtors”), hereby moves to dismiss the instant appeal of the defendant, Alcatel USA Marketing, Inc. (“Alcatel”). In support of this motion (the “Motion”), the LCEO respectfully represents as follows:

BACKGROUND

1. On December 21, 2001 (the “Petition Date”), the Debtors filed petitions for relief under 11 U.S.C. §§ 101 et seq. (the “Bankruptcy Code”) in the United States Bankruptcy Court for the District of Massachusetts (substantively consolidated under case no. 01-47641).

2. On December 17, 2003, the LCEO filed a complaint (the “Complaint”) initiating adversary proceeding no. 03-04741 against Alcatel. The LCEO seeks via the Complaint to recover certain transfers of money that the Debtors made to Alcatel during the 90 days preceding the Petition Date.

3. On March 29, 2004 Alcatel filed its Answer to the Complaint (the “Answer”). Subsequently, on April 30, 2004, Alcatel filed a Motion of Defendant Alcatel USA Marketing, Inc For Leave to File Amended Answer (the “Motion to Amend”). After hearing oral argument on May 12, 2004, the Bankruptcy Court, Rosenthal, J., denied the Motion to Amend from the bench.

4. Alcatel filed the Defendant’s Motion for Leave to Appeal and Request for Oral Argument (the “Motion for Leave”) on May 13, 2004, asking this Court to hear Alcatel’s appeal from the Bankruptcy Court’s interlocutory order denying the Motion to Amend.

5. Contemporaneously with the Motion for Leave, Alcatel filed a Notice of Appeal and an Election to Have Appeal Heard by the District Court. The record on appeal was transmitted to the District Court on May 24, 2004.¹

6. On May 20, 2004 the LCEO filed his Opposition to Defendant’s Motion For Leave to Appeal and Request For Oral Argument (the “Opposition”). The LCEO hereby incorporates by reference the Opposition, and for the reasons stated therein requests that the District Court dismiss Alcatel’s appeal.

¹ On May 21, 2004, Alcatel filed its Designation of Items to be Included in Record and Statement of Issues to be Presented on Appeal (the “Designation”) pursuant to Fed. R. Bank. P. 8006. Rule 8006 provides that

Within 10 days after filing the notice of appeal as provided by Rule 8001(a) [governing appeals as of right], *entry of an order granting leave to appeal*, or entry of an order disposing of the last timely motion outstanding of a type specified in Rule 8002(b), whichever is later, the appellant shall file with the clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented.

Fed. R. Bank. P. 8006 (emphasis added).

The LCEO notes that Alcatel’s Designation is premature given that the District Court has not granted leave to appeal.

WHEREFORE, the LCEO respectfully requests that the District Court:

- (i) Enter an order dismissing Alcatel's appeal; and
- (ii) Grant the LCEO such other and further relief as is just and proper.

**CRAIG R. JALBERT, LIQUIDATING
CEO**

By his attorneys,

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